BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE
NO. 02-144, JUDGE JOHN RENKE, III SC03-1846

MEMORANDUM OF LAW IN SUPPORT OF ACTUAL MALICE STANDARD REGARDING CANONS 7A(3)(a) and 7A(3)(d)(iii)

COMES NOW Respondent, Judge John Renke, III, by and through his undersigned counsel, and files this Memorandum of Law supporting the Aactual malice@ standard set forth in Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002), as the test by which the Judicial Qualifications Commission (the AJQC@) must prove alleged violations of Canons 7A(3)(a) and 7A(3)(d)(iii) and states:

The First Amendment to the United States Constitution provides a federal guarantee of free speech that, through the Due Process Clause of the Fourteenth Amendment, is applied to state governments. U.S. Const. Amends. I and XIV. The Florida Supreme Court has found no greater protection of speech provided under the Florida Constitution. City of Daytona Beach v. Del Percio, 476 So.2d 197 (Fla. 1985). AThe scope of the protection accorded to freedom of expression in Florida under article I, section 4 is the same as is required under the First Amendment.@ Department of Education v. Lewis, 416 So.2d 455, 461 (Fla. 1982). The Florida Supreme Court Ahas no authority to limit the constitutional protection and must apply the principles of freedom of expression as announced in the decisions of the

Supreme Court of the United States.@ Id. The federal constitution thus provides floor protections that must be afforded all individuals exercising their right of free expression. Florida courts may offer no less protection for freedom of speech than the bare minimum guaranteed under federal law.

Federal courts have the authority to enjoin enforcement of unconstitutional canons and statutes and have exercised that authority by granting injunctive relief. For example, See Zeller v. Florida Bar and Florida JQC, 909 F.Supp 1518 (N.D. Fla. 1995) (holding canon imposing time restrictions on solicitations for contributions to judicial candidates unconstitutional and granting preliminary injunction, final judgement and approving permanent injunction); ACLU v. Florida Bar and JQC, 744 F.Supp. 1094 (N.D. Fla. 1990) (granting injunctive relief to enjoin enforcement of former Florida Canon that prohibited announcement of judicial candidates= views, as same was not narrowly tailored to serve the stated interest); Doe v. Florida JQC, 748 F.Supp. 1520 (S.D. Fla. 1990) (enjoining JQC from enforcing a provision that prohibited complainant from disclosing fact that a complaint had been filed with the JQC); and Concerned Democrats of Florida v. Reno, 458 F.Supp. 60 (S.D. Fla 1978) (issuing preliminary injunction and holding statute that prohibited political organizations from endorsing judicial candidates unconstitutionally infringed First Amendment rights, as there were less restrictive

alternatives available for state to meet its interest in maintaining integrity and impartiality of the judiciary). The Butler series of cases discussed in Weaver also provide insight regarding the legal and procedural considerations at issue when federal jurisdiction is sought in the context of pending or anticipated disciplinary actions. See Weaver at 1321-1322. In the context of political speech, federal constitutional protections are stringently guarded as they are at the heart of our system of self governance. In Weaver, the Eleventh Circuit Court of Appeals restated the holding of the United States Supreme Court that A[a] candidate=s speech during an election campaign >occupies the core of the protection afforded by the First Amendment.=@ Weaver at 1319 (quoting McIntyre v. Ohio Elections Comm=n, 514 U.S. 334, 346 (1995)). In order to determine the constitutionality of content based restrictions on Acore political speech@ courts must analyze regulations under the exacting standard of strict scrutiny.

A strict scrutiny analysis imposes on government the heavy burden of establishing that a restriction is narrowly tailored to serve a compelling state interest. Weaver at 1319 (citing Republican Party of MN v. White, 536 U.S. 765 (2002)).[1] AWhen a State seeks to restrict directly the offer of ideas by a candidate to

[1] The United States Supreme Court held a Minnesota Aannounce clause@ unconstitutional in Republican Party of MN. v. White, 536 U.S. 765 (2002). On remand from the United States Supreme Court, the Eighth Circuit Court of Appeals

the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression.@ Brown v. Hartlage, 456 U.S. 45, 53-54 (1982).

In Weaver, the Eleventh Circuit Court of Appeals found a Georgia judicial canon facially unconstitutional under the First Amendment to the United States Constitution because it prohibited not only Afalse statements knowingly or recklessly made@ but also Afalse statements negligently made and true statements that are misleading or deceptive or contain a material misrepresentation or omit a material fact or create an unjustified expectation about results.@ Weaver at 1319. The Eleventh Circuit found that by prohibiting negligent false statements and misleading or deceptive true statements, the Georgia Canon chilled expression and did not afford the Arequisite >breathing space= to protected speech.=@ Id.

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applied the legal principles enunciated in Republican Party of MN. v. White and very recently held that Minnesota=s partisan-activities and solicitation clauses were also unconstitutional. Republican Party of MN v. White, 416 F.3d 738 (8th Cir. August 2, 2005).

The Eleventh Circuit also echoed the United States Supreme Court in stating that Aerroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the >breathing space= that they >need . . . to survive.=@ Weaver at 1319 (quoting Brown 456 U.S. at 60-61) (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 271-272 (1964)) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)). AThe chilling effect of . . . absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns.=@ Id. (quoting Brown at 61). More speech, as opposed to self-censorship or enforced silence, is the proper counterbalance to free expression.

While maintaining the actual and perceived impartiality of the judiciary may be a compelling state interest, any regulation of first amendment protected activity must be narrowly tailored. In order to be narrowly tailored, Arestrictions on candidate speech during political campaigns must be limited to false statements that are made with knowledge of falsity or with reckless disregard as to whether the statement is false - - i.e., an actual malice standard.@ Weaver at 1319-20. ARestrictions on negligently made false statements are not narrowly tailored under this standard and consequently violate the First Amendment.@ Id.

In effect, the Florida Supreme Court has enunciated the same standard as actual malice in the text of the Judicial Canons and Definitions, both of which are authoritative. See Preamble, Code of Judicial Conduct, Adopted September 29, 1994, effective January 1, 1995 (643 So.2d 1037), as amended through March 10, 2005 (No. SC03-1904). Under Florida Canon 7(3)(d)(iii), a misrepresentation must be Aknowing.@ The Formal Charges in this case further allege that misrepresentations were made Aknowingly and purposefully.@ While Florida=s Code of Judicial Conduct provides that knowledge may be inferred from circumstances, the authoritative definition requires Aactual knowledge@ of the fact in question. Therefore, Florida Canon 7 expressly requires the element of specific intent, much the same as the actual malice standard enunciated in Weaver.

The JQC has more broadly interpreted the scienter requirement in this case such that Canon 7 constitutes an unconstitutional infringement of protected speech as applied. Specifically, Formal Charges seek to apply Canon 7 to accurate information that the JQC claims is deceptive or misleading because certain facts that would have removed all ambiguity were omitted. Formal Charge 2 alleges that a photograph accurately depicting Judge Renke, III seated at a dais under a Southwest Florida Water Management District banner was misleading. Likewise, Formal Charge 3 alleges that a photograph accurately depicting Judge Renke, III

with several Clearwater firefighters who supported his election impermissibly implied that he had obtained the formal endorsement of Clearwater firefighters not pictured. Such overbroad application of Canon 7 is unconstitutional under the exacting standard of strict scrutiny. Voters in Florida have been entrusted with responsibility for electing judges. They should, therefore, be given both information regarding judicial candidate qualifications, and credit for their ability to discern how to interpret and use that information.

The overbroad interpretation and application of Canon 7 argued by the JQC will greatly chill future debate over the qualifications of judicial candidates. If a candidate is required to determine whether a reasonable person might potentially view campaign materials as misleading or somehow deceptive, the candidate will likely remain silent, rather than risk potential discipline. As the Eleventh Circuit correctly stated in Weaver:

> For fear of violating these broad prohibitions, candidates will too often remain silent even when they have a good faith belief that what they would otherwise say is truthful. This dramatic chilling effect cannot be justified by Georgia=s interst in maintaining judicial impartiality and electoral integrity. Negligent misstatements must be protected in order to give protected speech the Abreathing space@ it requires. The ability of an opposing candidate to correct negligent misstatements with more speech more than offsets the danger of a misinformed electorate that might result from tolerating negligent misstatements.

Weaver at 1320.

A government generally has no power to restrict expression because of its message, its ideas, its subject matter, or its content. See Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 686 (1989). Moreoever, A[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.@ Garrison v. Louisiana, 379 U.S. 64, 74 (1964). If Florida Canon 7 is applied to *truthful* speech that has *the potential* to mislead voters if they do not inquire further, it will surely not survive the highest level of strict scrutiny applicable to Acore political speech.@ Florida=s Canon 7 is facially overbroad and unconstitutional if applied to punish true or negligently false statements.

While the Florida Supreme Court has not yet specifically addressed Weaver, other courts have imposed an actual malice standard within the text of their judicial canons. Alabama responded after the Eleventh Circuit certified questions and retained jurisdiction to rule on abstention and possibly the merits of a challenge to an Alabama canon. Butler I, 245 F.3d 1257 (11th Cir. 2001); Butler II, 802 So.2d 207, 219; and Butler III, 261 F.3d 1154. The Supreme Court of Alabama narrowed its canon to provide that Aa candidate for judicial office shall not disseminate demonstrably false information concerning a judicial candidate or an opponent

›with actual malice - that is, with knowledge that it [is] false or with reckless disregard of whether it [is] false or not.=@ Butler v. Alabama Judicial Inquiry Commission, 802 So.2d 207, 218 (Ala. 2001) (quoting N. Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)). The Alabama Supreme Court correctly stated that the burden of proving ›actual malice= requires a demonstration by clear and convincing evidence that the judicial candidate A›realized that his statement was false, or that he subjectively entertained serious doubt as to the truth of his statement.=@ (*emphasis added*) Butler, at 218-219 (quoting Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 511 n. 30 (1984)).

See also Vanasco v. Schwartz, 401 F. Supp. 87 (EDNY), (three-judge court)(1975), summarily aff=d sub nom Schwartz v. Postel, 423 U.S. 1041 (1976) (holding that a state regulation could not constitutionally sanction a candidate=s statement on grounds that it was a Amisrepresentation@ rather than a false statement; regulation was facially unconstitutional under the First Amendment).

The United States District Court in Nevada upheld Canon 5A(3)(d)(iii), worded exactly as Florida Canon 7A(3)(d)(iii), after essentially equating Aknowing misrepresentations@ to Aknowing false statements@ and Afalse statements made with the reckless disregard@ - - the actual malice standard. Mahan v. State of NV Judicial Ethics and Election Practices Commission, 2000 WL 33937547 (D.Nev.

2000). In the same opinion, the court found that Nevada Canon 5A(3)(a), identical to Florida Canon 7A(3)(a), was unconstitutionally overbroad, because it could impose sanctions on speech that was completely true or was a reasonable opinion of a candidate. The court also found Canon 5A(3)(a) vague as to how it would be applied in the context of campaigns.

Issues in the instant case necessarily involve matters of federal law and protection of individual rights guaranteed under the United States Constitution. As discussed above, the availability of injunctive relief demonstrates the authority of the federal courts to insure the protection of constitutional guarantees. First Amendment protections have recently been further clarified by federal precedent in this Circuit. Accordingly, and as the Florida Supreme Court has already recognized in requiring Aactual@ knowledge as an element of misrepresentation under Florida Canon 7A(3)(d)(iii), the actual malice standard enunciated by the Eleventh Circuit Court of Appeals in Weaver is the appropriate standard to apply in JQC proceedings. The actual malice standard is consistent with the requirement of Aactual@ knowledge set forth in the Code of Judicial Conduct and definitions promulgated by the Florida Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of September, 2005, the original of the foregoing has been furnished by electronic transmission via e-file@flcourts.org and furnished by FedEx overnight delivery to: Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; and true and correct copies have been furnished by hand delivery to Judge James R. Wolf, Chairman, Hearing Panel, Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; Marvin E. Barkin, Esquire, and Michael K. Green, Esquire, Special Counsel, 2700 Bank of America Plaza, 101 East Kennedy Boulevard, P. O. Box 1102, Tampa, Florida 33601-1102; Ms. Brooke S. Kennerly, Executive Director, Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; John R. Beranek, Esquire, Counsel to the Hearing Panel, P.O. Box 391, Tallahassee, Florida 32302; and Thomas C. MacDonald, Jr., Esquire, General Counsel, Florida Judicial Qualifications Commission, 1904 Holly Lane, Tampa, Florida 33629.

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